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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 1 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Defining Certain Incumbent LEC	)	
Affiliates as Successors, Assigns,	)	CC Docket No. 98-39
or Comparable Carriers Under	)	
Section 251(h) of the	)	
Communications Act	)	
	)	
	)	

REPLY OF GTE SERVICE CORPORATION

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SUMMARY

GTE demonstrated in its Opposition that the CompTel Petition (the "Petition") is not supported by law or sound public policy. GTE advocated that the Commission deny the Petition because: (1) affiliates of ILECs that provide local services ("competitive affiliates") are not "successors or assigns" of these ILECs under Commission precedent and well-settled corporate law; (2) competitive affiliates are not "comparable" carriers of ILECs because such affiliates fail to satisfy even one of the three prerequisites for such a designation contained in Section 251(h)(2); (3) the Petition is an untimely petition for reconsideration of the *Non-Accounting Safeguards Order*; and (4) existing laws and regulations that protect competition make the Petition unnecessary.

The record supports GTE's Opposition. Commenters have shown that, because the Commission has already addressed the issues raised by the Petitioners in its *Non-Accounting Safeguards Order*, the Petition should be denied as an untimely petition for reconsideration. The record also provides ample evidence that competitive affiliates are not "successors or assigns" of ILECs under any reasonable definition of those terms. The brand names that the Petitioners claimed are transferred from ILECs to competitive affiliates are not even owned by ILECs. Additionally, competitive affiliates do not benefit from the borrowing power of affiliated ILECs, and employees supposedly "transferred" to competitive affiliates are actually hired by these affiliates (as they can be by any other telecommunications provider) and subject to strict rules concerning proprietary information. Furthermore, commenters demonstrated that competitive affiliates do not meet any of the three prerequisites for treatment as "comparable" carriers under Section 251(h)(2) of the Act.

The record also supports GTE's showing that existing Commission regulations, statutory protections, and state PUC oversight ensure that ILECs will honor their Section 251 obligations. The Act, and the Commission proceedings that implement it: (1) prohibit discrimination in the provision of services, interconnection, and network elements to affiliates; (2) prohibit "cost misallocation, unlawful discrimination, or a price squeeze;" and (3) establish strict transfer pricing requirements. Additionally, state PUCs have taken their oversight of affiliate relations seriously, and have overwhelmingly determined that affiliate relationships with ILECs do not threaten competition. Therefore, the Commission, and state PUCs, are fully able to ensure that the communications marketplace remains competitive.

Some CLECs and IXCs asked the Commission to consider variants of the Petitioners' proposals. These alternatives, however, would undermine competition, and, like the Petition itself, are unsupported by Commission precedent and statutory authority. Treating all competitive affiliates as ILECs, even if they do not use the brand name of an ILEC's corporate parent, is fundamentally inconsistent with Commission precedent. Additionally, imposing new regulations on affiliates' ability to construct facilities, or instituting a rulemaking designed to create new restrictions on competitive affiliates, is both unnecessary and contrary to public policy, since it would discourage investment in new technologies.

In short, the record supports swift denial of the Petition. Such a denial will allow competitive affiliates to continue to provide consumers with innovative services and will further Congress's goal of fostering competition in the communications marketplace.

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REPLY OF GTE SERVICE CORPORATION

GTE Service Corporation and its affiliate GTE Communications Corporation[1] (collectively, "GTE") hereby submit their Reply to the comments and oppositions filed in response to the Petition filed by the Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association ("Petitioners") in the above-captioned docket.[2] In its Opposition, GTE demonstrated that independent competitive affiliates owned and controlled by the corporate parent of an incumbent local exchange carrier ("ILEC") benefit consumers and enhance competition. In addition, GTE showed that there is no legal or factual

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[1] GTE Communications Corporation is an independent subsidiary established by GTE Corporation to provide competitive local exchange, interexchange, and other services. It is affiliated with the various GTE telephone operating companies by virtue of a common ultimate parent.

[2] Petition for Declaratory Ruling Or, In the Alternative, For Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act, CC Docket No. 98-39 (filed March 23, 1998) ("Petition").

basis for a finding that competitive affiliates are "successors or assigns" of ILECs; that competitive affiliates are not "comparable" carriers to ILECs; and that the Petition was procedurally improper.

The record in this proceeding strongly supports GTE's Opposition. Commenters demonstrated that:

> (1) the Petition is nothing more than a late-filed petition for reconsideration of the *Non-Accounting Safeguards Order*, in which the Commission decided that ILEC affiliates can provide local exchange service and use the brand of their related ILEC;
>
> (2) the Petitioners' legal and policy arguments are deeply flawed – the affiliates are not "successors or assigns" of ILECs; and
>
> (3) competitive affiliates do not satisfy even one of the Commission's three prerequisites for being deemed a "comparable" carrier under Section 251(h)(2).

Supporters of the Petition did not adequately respond to these showings, and did not proffer any basis upon which the Commission could reasonably grant the Petition. As will be discussed in detail below, the commenters supporting the Petition merely rehashed the flawed arguments originally put forth by the petitioners or proposed equally meritless alternatives. The Commission, therefore, should deny the Petition without delay.

I. The Petition Must Be Denied Because It Is an Untimely Petition for Reconsideration of the *Non-Accounting Safeguards Order*

Numerous commenters supported GTE's position that the Petition should be treated as an untimely petition for reconsideration of the Commission's *Non-Accounting*

Safeguards Order.[3] In that order, the Commission specifically discussed the possibility that BOCs might use competitive affiliates to evade Section 272 safeguards.[4] It carefully considered and rejected requests from various parties that strict new regulations be put in place to address this potential problem. In doing so, the Commission refused to constrain the activities of competitive affiliates, stating that "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services."[5] To make the matter even clearer, the Commission stated that only a competitive affiliate to which a BOC had transferred ownership of network elements would be deemed an "assign" of that ILEC,[6] and placed no limits on the ability of a competitive affiliate to share a corporate parent's brand name with the ILEC, rely on the borrowing power of the ILEC's holding company, or hire employees from the ILEC. The policy and analysis underlying these findings apply equally to non-BOC ILECs such as GTE.

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[3] *See* Comments of SBC Communications Inc., CC Docket No. 98-39 (May 1, 1998) at 4 ("SBC Comments"); Comments of BellSouth Corporation, CC Docket No. 98-39 (May 1, 1998) at 2 ("BellSouth Comments"); Ameritech Corporation Opposition, CC Docket No. 98-39 (May 1, 1998) at 2 ("Ameritech Comments"); Bell Atlantic Comments, CC Docket No. 98-39 (May 1, 1998) at 2 ("Bell Atlantic Comments").

[4] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Telecommunications Act of 1934, As Amended*, CC Docket No. 96-149, 11 FCC Rcd 21905, 22050 ("*Non-Accounting Safeguards Order*").

[5] *Id.* at 22055.

[6] *Id.*

Now, close to a year and a half after the *Non-Accounting Safeguards Order* was published in the Federal Register,[7] Petitoners have sought reconsideration in the form of a petition for declaratory rulemaking. The "issue in the *Non-Accounting Safeguards Order* was exactly the same as the issue [in the Petition]: what makes an incumbent LEC's affiliate a 'successor or assign' such that the affiliate is subject to all of the requirements imposed on the incumbent LEC?"[8] The Commission's answer to this question was clear – only when an ILEC transfers certain *network elements* to an affiliate will that affiliate be deemed an "assign."[9] "Although the Commission addressed the 'successor or assign' question in the context of section 272," SNET pointed out, "it made clear that the same analysis applies to section 251."[10] As Ameritech stated, "[t]hat being the case, the Commission may not," as the Petitioners would have it do, "'clarify' that 'an affiliate to which an ILEC has transferred anything that would be of value in providing in-region local service, such as brand name, capital, or personnel' is a successor or assign of the ILEC."[11] The Commission should recognize the Petition as

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7 62 FR No. 13 at 2927 (1997).

8 *See* SBC Comments at 5. *See also* Comments of the Southern New England Telephone Company, CC Docket No. 98-39 (May 1, 1998) at 6 ("SNET Comments") ("Thus, the central question, both here and in the *Non-Accounting Safeguards Order*, is the same: what makes an incumbent LEC's affiliate a 'successor or assign' such that the affiliate is subject to all of the requirements imposed on an incumbent LEC?").

9 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055.

10 SNET Comments at 5 (*citing Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054).

11 *See* Ameritech at 7-8 (quoting CompTel Petition at 1). *See also* SNET Comments at 3.

a late-filed petition for reconsideration of the Commission's *Order*, not a "clarification," and deny it as procedurally improper.

II. Competitive Affiliates of ILECs Are Not "Successors or Assigns"

In addition to being procedurally improper, the Petition lacks any substantive merit. As the record confirms, the Petitioners' argument that competitive affiliates are "successors" of ILECs under Section 251(h)(1)(B)(ii) is untenable. Although Section 251 does not define the term "successor," courts have consistently found that a "successor" must, through a "process of amalgamation, consolidation, or duly authorized legal succession . . . become invested with the rights and . . . assume[] the burdens" of the company it succeeds.[12] Therefore, as Bell Atlantic correctly explained, "[u]nder common law, there can be no successor or assign where a Bell company actively continues to provide local exchange service. A successor '*takes the place that another has left*, and sustains the like part of character.'"[13]

Ameritech noted that the Department of Justice has stated, in conformity with this definition, that "[t]he term 'successor' generally refers to one who *takes the place of*

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[12] *See, e.g. In re New York S. & W. R. Co.*, 109 F.2d 988, 994 (3d Cir. 1940) (quotation marks and citation omitted). *See also*, Comments of the United States Telephone Association, CC Docket No. 98-39 (May 1, 1998) at 5 ("USTA Comments") ("the petition ignores the fact that under the general corporate law of successorship, the presumption is that even if a corporation transfers all of its assets, the transferee is not liable as a 'successor' for the obligations or debts of the transferor").

[13] Bell Atlantic Comments at 5 (*quoting Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977) (*citing Wawak Co. v. Kaiser*, 90 F.2d 694, 697 (7th Cir. 1937)) (emphasis added).

another and retains the same rights, obligations, and property."[14] Similarly, the Connecticut Department of Public Utility Control has held that "[t]o be a successor, the corporation should, in all aspects, 'stand in the boots of the old one.'"[15]

The Petitioners have asked the Commission to ignore this long-established and generally applicable definition of the term "successor." Instead they argued that the Commission should adopt a definition based on the "doctrine of successorship," which was developed in the narrow context of the National Labor Relations Act. As demonstrated in GTE's Opposition, the cases that developed the "doctrine of successorship" clearly do not apply in the present proceeding. This doctrine is "strictly a labor law construct, shaped by considerations relevant to that area of the law, but fundamentally inapplicable here."[16] USTA noted that "the Supreme Court itself has distinguished the labor law doctrine of successorship from the successorship doctrines

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[14] *See* Ameritech Comments at 13 (quoting Response of the United States in Opposition to AirTouch's Motion for Declaratory Ruling that it is Not Subject to the Decree, Civil Action No. 82-0192, March 13, 1995, at 16 (emphasis added).

[15] *See Ameritech Comments* at 12-13 (quoting DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83, Docket No. 94-10-05 (Conn. Dept. Pub. Util. Con. June 25, 1997) at 45-49 (citations omitted) (emphasis added). *See also* USTA Comments at 6.

[16] See Opposition of GTE Service Corporation and GTE Communications Corporation (May 1, 1998) at 7 ("GTE Comments"). GTE, Ameritech, BellSouth, SBC and SNET point out that even the labor law cases cited by the Petitioners do not support their position. In each case, the successor had received assets of another entity far in excess than even the assets the Petitioners claim competitive affiliates have received from ILECs. Ameritech Comments at 14-16; BellSouth comments at 16-18; SBC Comments at 6-8; SNET Comments at 10.

of general corporation law."[17] Accordingly, the Commission should not abandon the common law's generally applicable definition of the term "successor," and should reject the Petition's arguments on this matter.

The indicia pointed to by the Petitioners and their supporters plainly do not establish a successor relationship. First, as GTE, Ameritech, and BellSouth explained, the competitive affiliates' use of a common brand name with an ILEC create no succession.[18] GTE Corporation, a holding company that owns both regulated ILECs and other subsidiaries, including a competitive provider of local and long distance services, own the brand name "GTE." Neither GTE's ILEC, nor the customers that the ILEC serves, owns the brand. This is also the case for Ameritech and BellSouth.[19] Therefore, a competitive affiliate's use of the brand is not a transfer from the ILECs to the affiliates at all.

Second, the record makes it clear that competitive affiliates have not, and could not, rely on ILEC assets or future revenues in securing debt instruments. GTE, Ameritech, and BellSouth all stated that their competitive affiliates have financing arrangements with their corporate parents, but not with their affiliated ILECs.[20] Such relationships are not improper; nor do they make the competitive affiliates "successors."

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17 USTA Comments at 7 (*quoting Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n. 5 (1973).

18 GTE Opposition at 8-10; Ameritech Opposition at 10; BellSouth Comments at 9-11.

19 Ameritech Opposition at 10; BellSouth Comments at 9.

20 GTE Opposition at 9; Ameritech Opposition at 11; BellSouth Comments at 11-12.

Organizations holding debt securities for these affiliates are told that "they will have no recourse to the assets or stock" of the ILECs.[21]

Third, although ex-employees of ILECs may be employed by competitive affiliates, this fact does not support a finding that these affiliates are "successors" of the ILECs. BellSouth, the target of most of the Petition's attacks on this issue, explained that fewer than ten employees of its competitive affiliate were former employees of its ILEC at the time of the testimony relied on by the Petitioners. "Hiring of fewer than ten of [the ILEC's] 57,000 employees" by the affiliate, BellSouth correctly stated, "hardly constitutes a 'shift of human capital.'"[22] With respect to GTE, employees of its ILEC may be hired away by its competitive affiliate as well as by various other CLECs. All employees hired away from GTE's ILECs are treated the same, regardless of the nature of their future employment. Departing employees are subject to strict requirements designed to prevent the loss of proprietary information, and are not allowed to copy or remove sensitive documents. Moreover, GTE's competitive affiliate hires employees not only from GTE's ILEC, but from other CLECs, ILECs, and a wide range of telecommunications companies.[23] In light of these considerations, there is no

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21 BellSouth Comments at 12.

22 *Id.*

23 GTE requires all employees to adhere to corporate safeguards imposed upon the relationship between GTE's ILEC and its competitive affiliate. GTE's policy states that "GTE Network Services [an ILEC] employees that are hired by GTE Communications Corporation [a competitive affiliate] cannot take with them any GTE Network Services information or material of any kind." GTE policy also mandates that any information made available to the competitive affiliate "must also be made available to all carriers."

legal or factual basis for concluding that competitive affiliates are "successors" to ILECs under any reasonable interpretation of that term.

Additionally, as discussed above, the Commission has already determined that an affiliate is the "assign" of an ILEC only when that ILEC transfers certain network elements to the affiliate.[24] Under the Commission's articulated standard, an affiliate that merely operates under the same or similar brand name as an ILEC and provides local services within that ILEC's region is not an "assign" of that ILEC under the *Non-Accounting Safeguards Order*. Because the Petitioners and their supporters did not allege that ILECs have transferred network elements to affiliates, the Commission can not reasonably treat competitive affiliates as "assigns" of ILECs.

III. The Commission Should Deny the Petitioner's Request for a Rulemaking Because Competitive ILEC Affiliates Do Not Satisfy Any of the Commission's Prerequisites for Being Deemed "Comparable" Carriers

Perhaps recognizing that competitive carriers are not "successors or assigns" of ILECs, the Petitioners requested in the alternative that the Commission initiate a rulemaking to establish a presumption that competitive affiliates that "provide[] local service in the same geographic area as the ILEC" be considered "comparable" carriers if an "ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate."[25] The record supports GTE's position that this rule would be inconsistent with Section 251(h)(2).

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[24] 11 FCC Rcd at 22054.

[25] Petition at 13.

The Commission may treat a LEC as an ILEC under Section 251(h)(2) if:

> (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an ILEC];
>
> (B) such carrier has substantially replaced an incumbent local exchange carrier . . . ; and
>
> (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.[26]

GTE agrees with SBC and Ameritech that the Petitioners' proposal "utterly ignores [Section 251(h)(2)'s] actual language,"[27] and that "[i]t doesn't take a brain surgeon to recognize that CompTel's proposed rule does not remotely reflect the three statutory requirements of section 251(h)(2), much less establish the basis for a clear and convincing showing."[28]

The record demonstrates that no competitive affiliate "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by" an ILEC. SBC noted that "[t]his Commission has recognized that an ILEC is an entity that 'control[s] the . . . local exchange network' and possesses substantial 'economies of density, connectivity, and scale' such that, in the absence of 'compliance with the obligations of section 251(c), [it] can impede the development of telephone

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[26] 47 U.S.C. § 251(h)(2).

[27] SBC Comments at 8.

[28] Ameritech Opposition at 21. *See also* SNET Comments at 10 ("The rule that CompTel proposes distorts the provision's language beyond recognition"); USTA Comments at 8-9 (stating that the Commission should reject the request for rulemaking).

exchange service competition.'"[29] Therefore, SBC explained, "[a] carrier in a 'comparable' position must . . . also 'occupy a dominant position in the market for telephone exchange service.'"[30] BellSouth revealed the absurdity of the Petitioners' position by noting that "[u]nder petitioners' theory, by hiring one [ILEC] employee, [a competitive affiliate] would become an ILEC, which would cause [the competitive affiliate], as a reseller and with no customers or facilities, to occupy 'a position in the market' comparable to [the ILEC's]."[31] GTE agrees that, because competitive affiliates do not control the telephone network, even if they use the same brand name as an ILEC or hire some ILEC employees (as can, and have, unaffiliated ILEC competitors), they cannot be deemed "comparable" carriers.[32]

The record also shows that no competitive affiliate "ha[s] substantially replaced [an] ILEC."[33] Ameritech explained that "[a]s the Commission recognized in the *Guam NPRM*, on its face, the term 'substantially replaced' means supplant."[34] There is no

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29 SBC Comments at 9.

30 *Id.*

31 BellSouth Comments at 20.

32 *See* GTE Comments at 16-17; *See also* Ameritech Opposition at 21 (the "suggestion . . . that an ILEC affiliate occupies a position in the market that is 'comparable' to the position occupied by the ILEC simply because both use the corporate parent's brand is specious. This suggestion also completely ignores the Commission's analysis of the meaning of 'comparable carrier' in the *Guam NPRM*"); SNET Comments at 11 ("a LEC that does not control the network simply cannot be deemed 'comparable' to an incumbent").

33 *See* Ameritech Opposition at 23.

34 Ameritech Opposition at 22 (quoting *Guam Public Utilities Commission for*

(Continued...)

evidence that any competitive affiliate has supplanted any ILEC. In the case of BellSouth, "BST [an ILEC] has more than 22 million customer access lines; BSE [a competitive affiliate] has none. BST has billions of dollars invested in a ubiquitous local exchange network in the area it serves; BSE has no network whatsoever."[35] Petitioners' argument that competitive subsidiaries substantially replace ILECs "with respect to the customers [they] serve," is illogical. As SBC points out, "[t]he mere fact that an affiliate seeks to serve customers currently served by the incumbent – otherwise known as the competition – cannot automatically mean that the affiliate has 'substantially replaced' the ILEC. Otherwise, all CLECs would qualify insofar as they seek to compete with (and take customers from) the ILEC."[36]

Moreover, treating competitive affiliates as "comparable" carriers is not "consistent with the public interest, convenience, and necessity and the purposes" of Section 251.[37] As GTE demonstrated in its Opposition, and as detailed in the next section of this reply, existing regulatory safeguards ensure that competitive affiliates will not engage in anti-competitive behavior with ILECs. Currently, competitive affiliates benefit consumers by offering a different bundle of services than ILECs. This

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Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act, 12 FCC Rcd 6942 (1997) (Declaratory Ruling and Notice of Proposed Rulemaking)) (citations omitted).

35 BellSouth Comments at 20.

36 SBC Comments at 9.

37 47 U.S.C § 251(h)(2).

combination of services may suit individual customer needs better than the services an ILEC can offer. Treating affiliates as comparable carriers would limit the ability to bundle services, and therefore diminish consumer choices. Recognizing the value of such affiliate offerings, the Commission has found that "as a matter of policy[,] . . . regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest . . . the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services."[38] The Petition's proposed rule "would stand this ruling on its head."[39]

IV. Existing Regulations Adequately Protect Against Favoritism, Despite CLECs' Self-Serving Claims to the Contrary

Supporters of the Petition alleged that, unless competitive carriers are deemed "successors or assigns" or "comparable" carriers, ILECs will be able to transfer assets

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[38] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057. *See* BellSouth Comments at 21; SBC Comments at 11. *See also* SNET Comments at 12 ("CompTel's proposal not only would conflict with Congress's intent, but also would impose potentially onerous burdens on the affiliates of incumbent carriers by hindering their ability to compete effectively, thereby harming consumers"); NTCA Comments at 2 ("In the pro-competitive environment created by the 1996 Act, the Commission should be looking for means to reduce, rather than expand regulation"); USTA Comments at 9 ("As a general matter, the petition's proposals are contrary to the Act's procompetitive, deregulatory intent").

[39] SBC Comments at 11.

and information to the affiliates, or treat these affiliates preferentially, and thereby avoid regulatory responsibilities.[40] These allegations are without merit.

The Commission closely regulates ILECs, to ensure that they do not discriminate in favor of their affiliates.[41] Section 251 itself prohibits ILECs from providing affiliates with better services than it provides to unaffiliated entities,[42] and Section 252 requires ILECs to "make available any interconnection, service, or network element provided under an agreement approved under [Section 251] . . . to any other requesting telecommunications carrier upon the same terms and conditions as those provided in

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[40] *See, e.g.*, e.spire Comments at 6 (ILECs could "discriminate by offering off-tariff discounts on accounts subject to competitive pressure," or "evade the Commission's requirement that CSAs be offered for resale at an avoided cost discount"); Intermedia Comments at 4 (ILECs could "transfer all of [their] end-user contracts to [their] affiliates as soon as contracts are negotiated to avoid its obligation to offer these contracts at wholesale rates"); Comments of MCI Telecommunications Corporation, CC Docket No. 98-39, at 6-7, 10 (May 1, 1998) (ILECs could offer "new UNEs" to affiliates "configured for the affiliate[s'] unique needs that are not useful to other CLECs . . . [which] would be available to all on a nondiscriminatory basis, but, since only the ILEC[s'] affiliate would want them, there would be no practical check on the ILEC[s'] preferential development or pricing of UNEs or other discrimination in favor of the affiliate in the provision of such UNEs") ("MCI Comments"); Nextlink Comments at 5-6 (ILECs could create affiliates that "offer services through the recombination of network elements that the ILEC itself does not offer, therefore neutralizing the ILEC's resale obligation altogether," or "share proprietary information with the affiliate that is not available to other competitors," or "provide the affiliate with better access to information on the design and operation of the OSS interfaces used by the ILEC").

[41] *See* SNET Comments at 9 ("detailed safeguards set forth in the Communications Act, the Commission's regulations, and general antitrust laws already proscribe discriminatory conduct by an incumbent carrier").

[42] 47 U.S.C. § 251(c)(2)(D) (imposing on ILECs "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . on rates, terms, and conditions that are just reasonable, and nondiscriminatory").

the agreement."[43] Furthermore, as Ameritech pointed out, an ILEC "may not 'transfer' customers to an affiliate: that's called slamming."[44] On the other hand, customers independently choosing to change providers because of different pricing or service options is evidence of a healthy market, and a sign that Congress's, the FCC's, and the state PUCs' work to encourage competition in local service is bearing fruit. Additionally, FCC rules prohibit "cost misallocation, unlawful discrimination, or a price squeeze" that advantages an affiliate; require accounting safeguards; and establish strict transfer pricing requirements.[45] With this arsenal of statutory provisions and rules at its disposal, ILECs are precluded from engaging in any action that would undermine full and fair competition.

V. State Public Utility Commission Oversight Makes FCC Action Unnecessary

State PUCs' oversight of affiliate relations reinforces the already adequate federal competitive safeguards discussed in the previous section. In addition to closely regulating ILECs and enforcing their interconnection and non-discrimination obligations, state regulators actively monitor ILEC relations with their affiliates. In the vast majority of cases, state PUCs have found that the relationships between ILECs and competitive affiliates do not raise competitive concerns.[46]

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43 *Id.* § 252(i).

44 Ameritech Opposition at 17.

45 *See* GTE Opposition at 20-21.

46 State commissions have granted GTE's competitive affiliate authority to provide
(Continued...)

MCI claims that the actions of the Texas PUC and the Michigan PSC concerning GTE's competitive affiliate "demonstrate" that "ILECs could use their local service affiliates to avoid their Section 251 and 252 obligations."[47] This assertion is incorrect. These proceedings, even as initially decided, do not suggest that GTE has attempted to evade its Section 251 and 252 obligations. In Texas, the state commission based a decision not to grant a certificate to GTE's competitive affiliate on a state code provision it interpreted to disallow any "person" from holding more than one certificate in a given area.[48] Competitive concerns played no part in the decision. In Michigan, the state commission did not deny GTE's competitive affiliate's certificate at all.[49] Instead it conditioned the effectiveness of the certificate on GTE's ILEC accomplishing interconnection and tariffing goals. In any event, GTE Communications Corporation disagrees with these state commissions' findings and is presently appealing the decisions.[50]

(...Continued)
services in thirteen of the fifteen states in which it has applied. The two states that did not grant authority, Texas and Michigan, are discussed below. *See, e.g., In the Matter of the Application of GTE Communications Corporation*, Cause No. 40831, Indiana Utility Regulatory Commission (Aug. 19, 1997) (attached as Exhibit A).

47 *See* MCI Comments at 8-9.

48 *Application of GTE Communications Corporation For A Certificate of Operating Authority*, Docket No. 16495, Public Utility Commission of Texas (Nov. 20, 1997).

49 *In the matter of the application of GTE Communications Corporation for the issuance of a license to provide and resell basic local exchange service*, Case No. U-11440, Michigan Public Service Commission (Dec. 12, 1997).

50 *See GTE Communications Corporation v. Public Utility Commission of Texas*, Case No. 980148 (Dist. Ct. Travis Co. Tex., Feb. 2, 1998); *In the matter of the*
(Continued...)

Although the Texas and Michigan commissions' actions do not suggest that GTE has undermined competition, they do demonstrate that state commissions are taking their oversight of affiliate relations seriously. This intensive oversight confirms that the Petitioners' request for additional FCC regulation of affiliate relations is completely unnecessary. The combined oversight of federal and state regulators, armed with statutes and rules specifically barring discriminatory conduct, is more than adequate. This being the case, and given the damage the proposed rules would cause to competition by hamstringing innovative new competitors, the Commission should deny the Petition.

VI. The Commission Should Reject the Commenters' Alternative Proposals

A number of commenters advanced variants of the Petitioners' proposals that would, in many cases, be even more burdensome. Like the Petitioners, these parties essentially seek untimely reconsideration of Commission decisions that clearly recognize the right of ILEC holding companies to establish subsidiaries to provide competitive local exchange and interexchange services on a non-dominant basis. Moreover, the public interest, convenience, and necessity would not be served by these alternative proposals. Instead, like the Petition, the alternatives advanced by other

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application of GTE Card Services Incorporated d/b/a GTE Long Distance for the issuance of a license to provide and resell basic local exchange service, Case No. U-11440 (Jan. 12, 1998) (Petition for Rehearing).

commenters would stifle competition in order to advance the interests of selected competitors.

For example, some commenters suggested that a competitive affiliate's regulatory status should be determined by examining the relationship between the service offerings and facilities provided by the affiliate and the affiliated ILEC. Sprint proposes that construction of new facilities by an affiliate in its ILEC's region should be presumed unreasonable.[51] Sprint also stated that new common carrier services provided through a competitive affiliate within an ILEC's territory must also be made available by the ILEC.[52] These proposals are not only unnecessary for the reasons discussed above, but fly in the face of Commission policy to promote competition and encourage facilities based investment and innovation.

Going even farther, ALTS appears to have suggested that all in-region ILEC affiliates should be treated as ILECs, even if they do not use brand names, financial, personnel, or other resources of the ILEC.[53] Likewise, e.spire claims that, regardless of the name used, all affiliated competitors providing wireline service within their ILECs' service areas should be treated as ILECs.[54] Like CompTel's petition, these proposals are fundamentally inconsistent with the Commission's determinations regarding

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51 *See* Sprint Comments at 5.

52 *Id.* at 5-6.

53 ALTS Comments at 5.

54 e.spire Communications Comments at 4-5.

competitive affiliates of ILECs' in the *Non-Accounting Safeguards Order* and the *Regulatory Treatment Order*.[55]

As discussed in GTE's Opposition, the Commission has already determined that holding companies of ILECs may establish competitive subsidiaries that provide interexchange and competitive exchange services without subjecting the competitive affiliate to onerous regulation – even if the subsidiary uses the same or a similar name to the ILEC and attempts to hire ILEC employees.[56] This being the case, it is absurd to suggest that an affiliate which is not using a brand name, or some other ILEC resource, should be subject to onerous regulation simply because it shares the same corporate parent as an ILEC.

Still other commenters requested that the Commission institute a separate rulemaking to address the potential for ILECs to evade their Section 251 responsibilities. AT&T maintained that a rulemaking is necessary "to specify in detail the minimum nondiscrimination, separation, transaction, and other requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC."[57] And, although Frontier advanced many of the same arguments in opposition to the CompTel petition as GTE, it nonetheless

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55 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054-55; *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756 (1997) (Second Report and Order) ("*Regulatory Treatment Order*").

56 *See Regulatory Treatment Order*, 12 FCC Rcd at 21905.

57 AT&T Comments at 6.

suggested that the Commission initiate a rulemaking to address the ability of an ILEC to avoid regulation by transferring to a competitive affiliate physical (as opposed to intangible) assets necessary to provide local exchange service.[58]

The rulemakings suggested by AT&T and Frontier are entirely unnecessary. First, as discussed above, the Commission has already articulated a clear standard for determining when an ILEC's competitive affiliate will be considered an ILEC itself: If, and only if, the ILEC "transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis" pursuant to section 251(c)(3).[59] The Commission further clarified this standard by emphasizing that "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services."[60] Thus, the Commission articulated the general rule that BOC, and by implication other ILEC, affiliates offering local exchange services are not successors or assigns, and do not need to be subject to additional regulation.

Second, the Commission's complaint procedures remain available where a competitor reasonably believes an ILEC is engaging in unlawful conduct with the purpose of evading Section 251 requirements.[61] Indeed, the Commission's *Non-Accounting Safeguards Order* contemplates such a case-by-case determination.

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58 *See* Frontier Comments at 7-8.

59 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054.

60 *Id.* at 22055; *see also* 47 C.F.R. § 64.1903(a).

61 *See* NTCA Comments at 2 ("To the extent corrective action is needed in any (Continued...)

Nor is it necessary to adopt additional resale rules, as suggested by Sprint.[62] As the Commission has already concluded, existing regulatory safeguards assure that ILECs will not engage in "cost misallocation, unlawful discrimination, or a price squeeze" in order to advantage their competitive affiliates.[63] In addition, transactions between an ILEC and any competitive affiliate established by its corporate parent are governed by the strict transfer pricing requirements contained in 47 C.F.R. § 32.27 and related state regulations. All of the proposed rulemakings are therefore unwarranted.

(...Continued)
individual case, the better way to proceed is through the Section 208 complaint process").

62 *See* Sprint Comments at 6-7.

63 *Regulatory Treatment Order*, 12 FCC Rcd at 15756; *See* 47 C.F.R. § 64.1903(a).